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Peter Michael Madden

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COMMENT

IN BANC PROCEDURES IN THE UNITED STATES COURTS OF APPEALS

I. INTRODUCTION

This Comment will examine various aspects of current in banc procedures in the United States courts of appeals.¹ Normally the courts of appeals sit in panels of three judges.² Each such panel, or division, of the court is considered to be the court of appeals and its decisions carry the full weight of the court.³ However, a court of appeals has the power to sit in banc,⁴ which means it may sit as a court comprised of all the circuit court judges in active service within the circuit.⁵ This procedure may be utilized on the initial hearing of the case or for the rehearing of a panel decision.⁶

Several factors have combined in recent years to increase the importance of in banc procedure. There has been a substantial increase in the number of appeals filed.⁷ This increase in caseload has led to an increase in judgeships⁸ and a need for even more.⁹ In addition, there has been a steady increase in the intercircuit assignment of judges.¹⁰ These facts decrease the control exercised by the majority of active judges over panel decisions.¹¹ The result may be failure to establish uniformity of decision within the court and

1. 28 U.S.C. § 46 (1970); Fed. R. App. P. 35. Although the Federal Rules of Appellate Procedure were not in effect until 1968, the rule controlling in banc proceedings, rule 35, is essentially a codification of prior case law. See *Western Pac. R.R. Corp. v. Western Pac. R.R.*, 345 U.S. 247 (1953); *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941). Since rule 35 uses "in" rather than "en," "in banc" will be used throughout this comment. A most comprehensive work on the subject is Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities* (pts. I & II), 40 N.Y.U.L. Rev. 563 & 726 (1965) [hereinafter cited as *Accommodating Institutional Responsibilities*].

2. Reviser's Note to 28 U.S.C. § 46(c) (1970); see *Western Pac. R.R. Corp. v. Western Pac. R.R.*, 345 U.S. 247, 254 (1953).

3. Reviser's Note to 28 U.S.C. § 46(c) (1970).

4. 28 U.S.C. § 46(c) (1970); *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 333 (1941); Fed. R. App. P. 35.

5. 28 U.S.C. § 46(c) (1970); Fed. R. App. P. 35.

6. 28 U.S.C. § 46(c) (1970); Fed. R. App. P. 35.

7. In 1973, 15,629 appeals were filed. This is an increase of 301% over the figure for 1960. Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change 1* (1973); see 1973 Director of the Admin. Office of the United States Courts Ann. Rep. 89 [hereinafter cited as 1973 Ann. Rep.].

8. 1970 Ann. Rep. 86-87.

9. *Id.* at 13.

10. *Cf. id.* at 26.

11. *Cf. Goldman, Conflict and Consensus in the United States Courts of Appeals*, 1968 Wis. L. Rev. 461; *Goldman, Conflict on the U.S. Courts of Appeals 1965-1971: A Quantitative Analysis*, 42 U. Cin. L. Rev. 635 (1973). But *cf. Friendly, Of Voting Blocs, and Cabbages and Kings*, 42 U. Cin. L. Rev. 673 (1973).

consequent frustration of the expectations of a party due to the particular composition of a panel.¹²

Some method is needed for the majority of active judges to maintain control over the panels.¹³ Use of the in banc procedure can accomplish this, allowing the majority of the court to exercise control over issues which are important to or often litigated in the circuit.

But questions about the effectiveness of in banc proceedings in achieving uniformity of justice remain. Can litigants rely on in banc review where there is conflict among panels? Do the provisions of the rule regulating in banc procedure provide tools for predicting? This leads to related questions. Should the provisions of the rule be amended or revised? Can problems that are central or ancillary to in banc proceedings be resolved or alleviated?

Some answers can be discerned by a review of the cases in the Court of Appeals for the Second Circuit in which in banc attention has been granted or denied since 1968, the effective date of the rule currently governing in banc procedure in the courts of appeals.

II. THE HISTORICAL DEVELOPMENT OF THE IN BANC PROCEDURE IN THE FEDERAL COURTS OF APPEALS

Prior to 1891 there were no courts of appeals in the federal system. The Evarts Act of 1891¹⁴ created courts of appeals interposed between the trial courts and the Supreme Court,¹⁵ and provided that the new courts "shall consist of three judges."¹⁶ Section 117 of the Judicial Code of 1911 continued the provision that the courts consist of three judges, but section 118 increased the number of judgeships in three circuits.¹⁷ By 1938, all but two circuits had more than three judges;¹⁸ however, only the Court of Appeals for the District of Columbia ever sat with more than three judges.¹⁹

In 1940 a conflict arose between the Ninth and Third Circuits concerning the power of a court of appeals to sit in banc. The Ninth Circuit, in a 1938 panel decision, held that section 117 of the Judicial Code mandated a court of three judges—no more.²⁰ In 1940, however, the Third Circuit began to decide some cases in banc.²¹ To resolve the conflict, the Supreme Court granted

12. Accommodating Institutional Responsibilities 578-86.

13. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 551 (1969); Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 96 (1954) [hereinafter cited as Maris].

14. Ch. 517, § 2, 26 Stat. 826.

15. See Accommodating Institutional Responsibilities 569.

16. Evarts Act of 1891, ch. 517, § 2, 26 Stat. 826.

17. Judicial Code of 1911, ch. 231, §§ 117-18, 36 Stat. 1131.

18. See Act of Aug. 3, 1949, ch. 387, § 1, 63 Stat. 493; Historical & Revision Notes to 28 U.S.C. § 44 (1970); Note, *The Power of a Circuit Court of Appeals to Sit En Banc*, 55 Harv. L. Rev. 663, 665-66 (1942).

19. Accommodating Institutional Responsibilities 570-71 & n.60.

20. *Lang's Estate v. Commissioner*, 97 F.2d 867, 869 (9th Cir.), certified question answered, 304 U.S. 264 (1938).

21. See *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 67-71 (3d Cir. 1940) (en banc), aff'd, 314 U.S. 326 (1941).

certiorari in *Textile Mills Securities Corp. v. Commissioner*,²² and decided that a court of appeals has the inherent power to sit in banc. The Court held unanimously that section 117 was impliedly amended by section 118, the purpose of which was to create a court of all the active judges in the circuit.²³

Congress codified the *Textile Mills* decision in section 46(c) of the Judicial Code of 1948. Congress provided, however, that the more efficient panels would continue to dispose of the bulk of appeals and stated that a majority vote of the active judges in the circuit would be required for in banc consideration.²⁴ Neither *Textile Mills* nor the Code of 1948 set forth any particular procedure to follow, nor did either indicate what cases might be appropriate for in banc consideration.

In 1953, in *Western Pacific R.R. Corp. v. Western Pacific R.R.*,²⁵ the Supreme Court held that a petitioner for a rehearing in banc could not compel the court to take a vote on his petition; he could only *suggest* the advisability of such a proceeding. However, a judge of the court could call sua sponte for the vote. The Court did not indicate any particular procedure to be followed but it did say that whatever procedure was settled upon should be publicized.²⁶ After this decision, each circuit developed rules concerning the in banc procedure. These rules, however, were not uniform, nor did they fully explain the various intramural processes employed by the different circuits in dealing with petitions for proceedings in banc.²⁷

Rule 35 of the Federal Rules of Appellate Procedure eliminates much of the inconsistency. Rule 35 offers a *procedure* that is the same for all the courts of appeals, although the intramural processes often remain slightly different. Whether the rule has brought equal uniformity to the *treatment* of in banc petitions remains to be seen.²⁸

III. RULE 35 AND RELATED RULES

A. Rule 35

The text of rule 35 is as follows:

Determination of Causes by the Court in Banc

(a) When Hearing or Rehearing in Banc Will be Ordered. A majority²⁹ of the

22. 314 U.S. 326 (1941). See generally Note, The Power of a Circuit Court of Appeals to Sit En Banc, 55 Harv. L. Rev. 663 (1942); Comment, The En Banc Procedures of the United States Courts of Appeals, 21 U. Chi. L. Rev. 447 (1954).

23. 314 U.S. at 331-35.

24. 28 U.S.C. § 46(c) (1970).

25. 345 U.S. 247 (1953).

26. Id. at 267-68.

27. See Note, En Banc Procedure in the Federal Courts of Appeals, 111 U. Pa. L. Rev. 220 (1962).

28. See generally *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1020-21 (2d Cir. 1973) (Hays, Kaufman & Mansfield, J.J., concurring), vacated and remanded, 94 S. Ct. 2140 (1974).

29. In a court of eight judges, the vote of four will not suffice—despite the fact that they may be the majority of those voting. This does not mean that a majority of the court cannot form the quorum needed to operate as an in banc court. See *Alltmont v. United States*, 177 F.2d 971, 973 (3d Cir.) (en banc), cert. denied, 339 U.S. 967 (1950). Abstention or disqualification is equivalent

circuit judges who are in regular active service³⁰ may order³¹ that an appeal or other proceeding be heard or reheard³² by the court of appeals in banc. Such a hearing or rehearing is not favored³³ and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc.³⁴ The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken³⁵ to determine whether the cause shall be heard or reheard in banc

to a negative vote. Note, *Federal Jurisdiction and Practice*, 47 *St. John's L. Rev.* 339, 345-48 (1972).

30. See, e.g., *Shenker v. Baltimore & O.R.R.*, 374 U.S. 1, 4 (1963); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1020 (2d Cir. 1973), vacated and remanded, 94 S. Ct. 2140 (1974).

There has been a problem defining active judges to be counted toward a majority. The problem arose whether a senior judge could vote in deciding whether a case would be considered in banc. It was decided that he could not vote and could not sit in banc. *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960). This result was changed by amending 28 U.S.C. § 46(c), which now allows a senior judge who sat on the original panel to call for a vote and to sit in banc. However, he still may not vote for or against the holding of the in banc proceeding. See *Fed. R. App. P.* 35(b); *Moody v. Albemarle Paper Co.*, 94 S. Ct. 2513, 2515-16 (1974). The status of other non-active judges remains unclear. See *Accommodating Institutional Responsibilities* 597. Rule 35 also allows any judge who sat on a panel to call for a vote on rehearing in banc. In addition, a judge who is sitting on a panel of a circuit court but who is not a judge of the circuit may call for a vote on in banc consideration; but, again, he may not vote on the question and he may not sit in banc. See, e.g., *Moody v. Albemarle Paper Co.*, *supra* at 2515-16; *United States v. Hayden*, 445 F.2d 1365, 1380 (9th Cir. 1971) (en banc); *United States v. Clay*, 422 F.2d 1330 (5th Cir. 1970) (en banc).

31. The procedure is available on the merits only, not on preliminary motions. *Krakoff v. United States*, 431 F.2d 847 (6th Cir. 1970) (en banc).

32. A hearing is more efficient than a rehearing. Initial hearing in banc consumes less time than rehearing after a panel has rendered a decision. *Accommodating Institutional Responsibilities* 599; cf. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1026 (2d Cir. 1973) (Oakes, J., dissenting), vacated and remanded, 94 S. Ct. 2140 (1974) (155 days required for rehearing). Initial hearing in banc also bypasses many of the problems peculiar to rehearings. The major difficulty with an initial hearing in banc is that the importance of the issues or the possibility of a conflict may not be apparent at this point. These would be more readily apparent after a panel decision. However, postponing a hearing in banc until after a panel decision may cause unnecessary duplication of effort for both the court and the litigants.

33. That in banc procedure is not favored is evidenced by the small number of in banc proceedings held. In fiscal year 1973, the courts of appeals had oral hearing on 23 cases in banc of a total of 6,555 cases heard during the year. 1973 *Ann. Rep.* 106. The primary cause for the limited application of the procedure is the increasing size of the appellate docket. Expanding backlogs pressure judges to increase terminations and panels are a far more efficient means to that end. See, e.g., *Walters v. Moore-McCormack Lines, Inc.*, 312 F.2d 893, 894-95 (2d Cir. 1963) (en banc); *Accommodating Institutional Responsibilities* 574. Not only does a sitting in banc occupy the entire bench, but in banc decisions take substantially longer to come down than do panel decisions.

34. A party may not compel the court to act on the suggestion. See note 25 *supra* and accompanying text.

35. See *Western Pac. R.R. Corp. v. Western Pac. R.R.*, 345 U.S. 247 (1953); *United States v.*

unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such suggestion made by a party.³⁶

(c) Time for Suggestion of a Party for Rehearing in Banc;³⁷ Suggestion Does Not Stay Mandate. If a party desires to suggest a rehearing in banc, the suggestion must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise.³⁸ The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.³⁹

Although rule 35 is of recent origin,⁴⁰ it is derived essentially from prior case law⁴¹ and statutes.⁴² These sources, along with the Advisory Committee notes,⁴³ will be used to explain the rule.

Clay, 422 F.2d 1330 (5th Cir. 1970) (en banc); *United States v. Luis*, 422 F.2d 1322 (5th Cir. 1970) (en banc); *General Ins. Co. of America v. United States*, 409 F.2d 1326 (5th Cir. 1969) (en banc).

36. Nothing in the rule prevents a judge who is in active service or who sat on a panel from requesting a vote sua sponte: "The rule merely authorizes a suggestion . . . and provides that suggestions will be directed to the judges of the court in regular active service." Advisory Committee Note, Fed. R. App. P. 35, 28 U.S.C. (1970).

37. The rule is unclear as to when an original hearing in banc should be suggested. The best time and place would seem to be in the original brief. The clerk could then transmit the suggestion to the court prior to the assignment of the panel. However, this procedure is mandatory in only one circuit. D.C. Cir. R. 14. A suggestion for rehearing may be, but need not be, contained in a formal petition. Advisory Committee Note, Fed. R. App. P. 35, 28 U.S.C. (1970). This is in accord with *Western Pac. R.R. Corp. v. Western Pac. R.R.*, 345 U.S. 247 (1953), which said that the issues of a panel rehearing and rehearing in banc are to be considered separately. Since a formal petition is not required for a rehearing, apparently one is not required earlier. A suggestion for an original hearing in banc could be made in the form of a written, or even an oral, motion. See *id.*

38. The suggestion that a case be reheard in banc is most often contained in a petition for panel rehearing. It is treated as a petition for panel rehearing with a suggestion for an in banc proceeding. It may be dealt with by the panel that rendered the decision without considering the suggestion. Advisory Committee Note, Fed. R. App. P. 35, 28 U.S.C. (1970).

39. Compare this with the effect of the petition for rehearing itself. See Fed. R. App. P. 41. Only one circuit has a rule concerning the effect of granting the suggestion. Rule 3(b) of the Sixth Circuit provides that, upon the grant of the suggestion, the previous judgment will be vacated, the mandate stayed, and the case returned to the docket as pending appeal. This provision is similar to and consistent with the provisions in rules 40 and 41 of the Federal Rules of Appellate Procedure relative to rehearings. Rule 40 provides: "If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate" Fed. R. App. P. 40(a). Rule 41 provides that the mandate will be stayed, upon timely filing of a petition for rehearing, until the court disposes of the petition.

40. The Federal Rules of Appellate Procedure were adopted by order of the Supreme Court on December 4, 1967 to be effective July 1, 1968. 389 U.S. 1065 (1967).

41. See *Western Pac. R.R. Corp. v. Western Pac. R.R.*, 345 U.S. 247 (1953); *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941).

42. 28 U.S.C. § 46(c) (1970).

43. The Advisory Committee notes are found in Fed. R. App. P. 35, 28 U.S.C. (1970).

B. *Related Rules in the Federal Rules of
Appellate Procedure*

It might be said that a rehearing in banc is just another type of rehearing⁴⁴ and that rule 35 simply imposes two additional criteria upon those used to determine whether a case should be reheard by a panel.⁴⁵ There are indications within the rule and the Advisory Committee Notes that this is the intent of the Committee. The rule imposes the same time limit for a suggestion as does rule 40 for a petition for rehearing. In addition, the Advisory Committee Note states that "[t]he rule merely authorizes a suggestion, imposes a time limit on suggestions for rehearings in banc, and provides that suggestions will be directed to the judges of the court in regular active service."⁴⁶ This self-imposed limitation implies that the rules for the granting of a rehearing by a panel still apply.

The rule that governs petitions for rehearing by a panel is rule 40. It provides a fourteen day time limit to file,⁴⁷ starting the day after judgment is entered. The time limit may be lengthened or shortened at the discretion of the court.⁴⁸ The petition for rehearing will contain a statement that sets forth with particularity the points that the petitioner feels have been overlooked or misapprehended.⁴⁹ The idea of a rehearing is not to reargue the case,⁵⁰ but to call to the attention of the court some material fact or point of law that was not properly considered by the court and that would have produced a different outcome.⁵¹ The petition may also contain an argument in support of rehearing.⁵² Since the petitions rarely are granted, answers are, for the most part, unnecessary, as well as wasteful of time and money.⁵³ However, the court may request an answer. The petition "will ordinarily not be granted in the absence of such a request."⁵⁴ The court may then dispose of the case "without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case."⁵⁵

C. *Related Courts of Appeals Rules*

The courts of appeals may still make and amend rules for practice within the circuits.⁵⁶ Rule 47 provides that these rules are to be enacted by the

44. See *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1025 (2d Cir. 1973) (Oakes, J., dissenting), vacated and remanded, 94 S. Ct. 2140 (1974).

45. Compare Fed. R. App. P. 35(a) with Fed. R. App. P. 40(a).

46. Advisory Committee Note, Fed. R. App. P. 35(c), 28 U.S.C. (1970); see Fed. R. App. P. 40(a).

47. Fed. R. App. P. 40(a). Both 28 U.S.C. (1970) and 9 J. Moore, *Federal Practice* (2d ed. 1973) have comprehensive time schedules.

48. Fed. R. App. P. 40(a).

49. *Id.*

50. *Anderson v. Knox*, 300 F.2d 296 (9th Cir. 1962).

51. *NLRB v. Brown & Root, Inc.*, 206 F.2d 73 (8th Cir. 1953) (en banc).

52. Fed. R. App. P. 40(a).

53. See Advisory Committee Note, Fed. R. App. P. 40, 28 U.S.C. (1970).

54. Fed. R. App. P. 40(a).

55. *Id.*

56. 28 U.S.C. § 2071 (1970).

majority of the court, and are not to be inconsistent with the Federal Rules of Appellate Procedure. They may supplement the Federal Rules or they may regulate matters not governed by the Federal Rules.⁵⁷ These rules generally are administrative and housekeeping, concerned for the most part with matters other than actual courtroom procedure; however, in some cases they are applicable to a procedure under the Federal Rules. All but three⁵⁸ of the circuits have a rule that applies to the in banc procedure,⁵⁹ but of these only three provide any additions to the requirements of rule 35.⁶⁰

IV. IN BANC PROCEEDINGS: WHEN AND WHY

Rule 35(a) of the Federal Rules of Appellate Procedure states that a case will be heard by the court in banc only: "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."⁶¹

In *United States v. American-Foreign Steamship Corp.*,⁶² Justice Stewart, quoting Judge Maris,⁶³ stated the main purpose of the in banc procedure as follows:

"The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court."⁶⁴

Justice Stewart called for the use of the in banc procedure in the extraordinary cases which require "authoritative consideration and decision by those charged with the administration and development of the law of the circuit."⁶⁵

57. Fed. R. App. P. 47. See also Fed. R. Civ. P. 83.

58. The Second, Fourth, and Tenth Circuits have no rule relating to the in banc proceeding.

59. See D.C. Cir. R. 14; 1st Cir. R. 16; 3d Cir. R. 2(3), 22; 5th Cir. R. 12; 6th Cir. R. 3(b); 7th Cir. R. 4(b); 8th Cir. R. 7; 9th Cir. R. 12.

60. Rule 14 of the Court of Appeals for the District of Columbia Circuit states that a suggestion for an in banc proceeding, if not in a petition for a rehearing, shall be filed on the date the appellee's brief is due. It also provides that the suggestion shall not exceed ten pages and shall be served in compliance with rule 25 of the Federal Rules. This rule makes eminent sense. It covers an area not covered by the Federal Rules and clarifies when and how a suggestion should be made to the court that a case is appropriate for consideration in banc on original hearing.

Rule 3(b) of the Court of Appeals for the Sixth Circuit clarifies the effect of granting a rehearing in banc by treating it as a regular rehearing.

Rule 12 of the Court of Appeals for the Ninth Circuit simply provides that where a suggestion for a rehearing in banc is contained within a petition for rehearing, the cover of the combined suggestion-petition must state that a suggestion is contained within it.

61. Fed. R. App. P. 35(a).

62. 363 U.S. 685 (1960).

63. The Honorable Albert B. Maris, senior judge of the Court of Appeals for the Third Circuit, was Chairman of the Standing Committee on Rules of Practice and Procedure and a member of the Advisory Committee on Appellate Rules.

64. 363 U.S. at 689-90 (quoting Maris 96).

65. 363 U.S. at 689.

These statements explain the underlying purpose of the in banc procedure: the maintenance of control over the decisions within the circuit. The cases that are to be heard or reheard in banc are limited to the areas in which there is either a possible split by a minority within the circuit, resulting in the loss of majority control over some decisions,⁶⁶ or an issue of such major import to the circuit as to make desirable the exercise of the greater authority of the entire court.⁶⁷

It is often difficult to categorize in banc cases as representative of either of the above two criteria. The opinions in banc rarely speak of the particular reason why the case is being considered in banc. In some cases, however, a judge writes a dissent to a denial that gives some reasons why he feels the particular case should have been considered in banc. In these instances the judges rarely limit themselves to simply one category.⁶⁸ It appears that this reflects the very nature of the cases most likely to be granted consideration in banc: cases in which both criteria are present.⁶⁹ The nature and content of the criteria are less predictable, however. A review of the cases heard in banc by the Court of Appeals for the Second Circuit since the effective date of rule 35 does not lead to neatly identifiable categories and generalizations. However, it is possible to delineate some general characteristics that are indicative of a case that would be granted in banc consideration.

A. *In Banc Proceeding to Maintain Uniformity of Decisions*

The courts of appeals have a duty to develop the federal law with uniformity.⁷⁰ This, of necessity, requires that different panels of a court of appeals in the same circuit adhere to the prior decisions of other panels in the same circuit. Otherwise a litigant would be at the mercy of the fortuitous composition of the panel assigned to his case.⁷¹

A subsequent panel decision may, of course, overrule a prior panel decision. A panel is not meant to be controlled by precedent that is inadequate, outmoded, or wrongly decided.⁷² However, where there is disagreement about the correctness of a decision among the active circuit judges, conflicts may develop in later decisions when these judges feel the need and exert their right to overrule the prior decision.⁷³ The in banc process is designed, or at

66. Maris 96.

67. Id. at 97; *Walters v. Moore-McCormack Lines, Inc.*, 312 F.2d 893, 894 (2d Cir. 1963) (en banc). See also *Jackson v. Statler Foundation*, 496 F.2d 623, 636-37 (2d Cir. 1974) (Friendly, J., dissenting).

68. See, e.g., *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1021, 1026 (2d Cir. 1973) (Oakes, J., dissenting), vacated & remanded, 94 S. Ct. 2140 (1974); *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973), rev'd, 416 U.S. 1 (1974).

69. See Maris 97.

70. Id. at 96; *Accommodating Institutional Responsibilities* 578.

71. See Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 Wis. L. Rev. 461.

72. K. Llewellyn, *The Common Law Tradition: Deciding Appeals* 78-83 (1960).

73. See Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 Wis. L. Rev. 461, 476-77.

least intended, to serve this function.⁷⁴ In a proceeding in banc all the active judges in the circuit establish a rule of the majority for the circuit. While it always remains a possibility that the outvoted minority might try to circumvent the majority, this is less likely in the face of the more authoritative in banc precedent than it would be where there were merely precedential panel decisions.⁷⁵

"Mere disagreement, or likelihood of disagreement, with the panel decision, has not generally been regarded as sufficient reason for a further hearing"⁷⁶ Although it is often in the interest of efficient judicial administration to hear a case in banc where a possibility of conflict exists, the issues that are likely to cause dissension among the judges of a circuit are rarely apparent prior to the assignment of cases to the various panels.⁷⁷ A judge might request a vote on in banc hearing when he has read the briefs, or after argument.⁷⁸ However, the possibility of a disagreement or conflict with prior panel decisions rarely is evidenced even at this time.

The most appropriate time for determining when the issue presents an imminent conflict among panel decisions is between the time a judge writes the panel decision and the time the case is finally decided. At this time, if the decision of the panel is circulated among the active judges of the circuit for their suggestions on the decision as written, the non-sitting judges have the best means possible to grasp the implications of the decision. They can call for a hearing in banc before the decision is published, thereby avoiding many of the problems of a rehearing in banc. This process also allows members of other panels to compare their own unpublished decisions with the circulated opinion and thus provides an opportunity to prevent a conflict by consolidating the cases for hearing in banc.

The goal of securing or maintaining uniformity, in and of itself, is unlikely to trigger review in banc. Cases in the Second Circuit reveal that, where the court has expressed or implied that uniformity was a reason for granting in banc consideration, the substantive issues have often, but not always, met the

74. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam); *In re Burwell*, 350 U.S. 521, 522 (1956).

75. *Walters v. Moore-McCormack Lines, Inc.*, 312 F.2d 893, 894 (2d Cir. 1963) (en banc); see *Maris* 97.

76. *Walters v. Moore-McCormack Lines, Inc.*, 312 F.2d 893, 894 (2d Cir. 1963) (en banc). Where a number of cases presenting similar issues have resulted in inconsistent decisions in the district court (see, e.g., *Rodriguez v. McGinnis*, 456 F.2d 79 (2d Cir. 1972) (en banc), rev'd sub nom. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Accommodating Institutional Responsibilities* 586), the cases are often consolidated upon appeal and given to a panel rather than heard in banc. There is no rule in the Federal Rules of Appellate Procedure that allows such action. However, rule 42 of the Federal Rules of Civil Procedure allows such action in cases with a "common question of law or fact." Rule 1 of the Federal Rules of Civil Procedure states that these rules apply to cases in the United States District Courts. But for some authority that these rules apply to appellate proceedings, see 2 J. Moore, *Federal Practice* ¶ 1.13, at 281-86 & 9 id. ¶ 201.08[1], at 534-36 (2d ed. 1974) (citing *Maryland Cas. Co. v. Conner*, 382 F.2d 13 (10th Cir. 1967)).

77. See *Western Pac. R.R. Corp. v. Western Pac. R.R.*, 197 F.2d 994, 1014 (9th Cir. 1951), vacated and remanded, 345 U.S. 247 (1953); *Maris* 93.

78. See *Accommodating Institutional Responsibilities* 727.

alternative requirement of rule 35 as well,⁷⁹ viz., "questions of exceptional importance."⁸⁰

Even in cases where the court in banc does not make reference to issues of importance, there is frequently a marked parallel between the issues in the cases under consideration and other cases given in banc attention. For instance, in two companion cases,⁸¹ where confusion in the circuit and misinterpretation of an earlier circuit case were apparent reasons for granting in banc consideration,⁸² the substantive issues on appeal centered on whether an evidentiary hearing was required on a habeas corpus petition where defendant contested the voluntariness of his confession or guilty plea. The court made no reference to the importance of the case, but civil rights cases have often been considered important and given in banc consideration in the Second Circuit.⁸³

In cases in which a prior decision of the circuit is reversed by a panel or where circuit judges disagree with their earlier decisions on a panel, uniformity seems to be the paramount factor underlying the decision to grant in banc review. In several such cases in the Second Circuit, the substantive issues do not seem to fall within any category of exceptionally important cases.

For instance, *Caplin v. Marine Midland Grace Trust Co.*⁸⁴ involved a breach of duty claim by a trustee in reorganization against the trustee of an indenture. The court apparently accepted the case in banc to exert its control over the panel, which had reversed a circuit case of long standing. The court in banc reversed the panel's decision.⁸⁵ In *Local 1251 UAW v. Robertshaw Controls Co.*,⁸⁶ a case concerning the construction and validity of a labor contract, the court in banc took the opportunity to overrule a prior circuit decision which had been ill received⁸⁷ and, the court asserted, erroneous in its rationale and result.⁸⁸ A more complex case, *United States v. Tarrago*⁸⁹ included elements that could be labelled "exceptionally important." The issue considered in banc concerned the retroactive effect on *Tarrago* of the adoption in another Second Circuit case decided while *Tarrago* was on appeal,⁹⁰ of a

79. See, e.g., *Rodriguez v. McGinnis*, 456 F.2d 79 (2d Cir. 1972) (en banc), rev'd sub nom. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *United States v. Gonzales*, 442 F.2d 698 (2d Cir. 1970) (en banc), cert. denied, 404 U.S. 845 (1971); *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir.) (en banc) (consolidated with *Stevens v. Tyng*), cert. denied, 396 U.S. 844 (1969).

80. This criterion is discussed in subsection B, *infra*.

81. *United States ex rel. Ross v. McMann*, 409 F.2d 1016 (2d Cir.) (en banc), vacated, 397 U.S. 759 (1969); *United States ex rel. Rosen v. Follette*, 409 F.2d 1042 (2d Cir. 1969) (en banc), cert. denied, 398 U.S. 930 (1970).

82. See 409 F.2d at 1019-22; 409 F.2d at 1043-44.

83. See also 1973 Ann. Rep. 126 (increase in prisoner petitions).

84. 439 F.2d 118 (2d Cir. 1971) (en banc), aff'd, 406 U.S. 416 (1972).

85. *Id.* at 120, 123-24.

86. 405 F.2d 29 (2d Cir. 1968) (en banc).

87. *Id.* at 31-32.

88. *Id.* at 33.

89. 398 F.2d 621 (2d Cir. 1968) (en banc).

90. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966).

broader rule of criminal responsibility. In accepting the case in banc, the court wished to re-examine, and ultimately it reaffirmed,⁹¹ a prior panel decision.⁹² Although the case involved an important issue, desire for uniformity was an equally strong catalyst in the mind of at least one judge.⁹³

B. *In Banc Hearing or Rehearing for Issues of
Exceptional Importance*

When an issue is important enough to merit a proceeding in banc is a difficult determination and has been the subject of controversy.⁹⁴ The language of rule 35 sets forth but one qualification—"exceptional." Many cases are important: they have impact beyond their own facts, involve large sums of money, are complicated, or concern many litigants. However, in the light of the ever increasing caseload, it is obvious that all such cases cannot be granted the attention of the entire court. Indeed there is no reason to suggest that panels are in any way incapable of handling important issues.⁹⁵

In *Walters v. Moore-McCormack Lines, Inc.*,⁹⁶ a case which predated rule 35, Chief Judge Lumbard of the Second Circuit set forth some general requirements for the in banc procedure. The most important requirement was that "the case [involve] an issue likely to affect many other cases."⁹⁷ Such an issue is one which is "of sufficient concern to enough litigants who are or may become involved in similar situations so that the even-handed administration of justice will be benefited by a decision by the entire court."⁹⁸ Judge Lumbard further qualified the proper case as one which presents a legal principle, not just an application of a principle to the facts.⁹⁹ Indeed it has been said that an in banc proceeding will not be used to take an appeal from a criminal trial on its facts and there has been a general rule, at least in the Second Circuit, that an in banc proceeding will not be invoked to resolve an injustice that is personal in nature.¹⁰⁰

Since the inception of rule 35, the requirements set forth by Chief Judge Lumbard have interlocked in a number of cases and given rise to a category of cases that might be designated as leading.

91. 398 F.2d at 623.

92. *United States v. Sheller*, 369 F.2d 293 (2d Cir. 1966).

93. Chief Judge Lumbard stated: "I voted in favor of en banc consideration . . . because it seemed to me that it is important in all situations where, after submission to all active judges, we announce a new rule for the district courts to apply in determining issues raised in criminal cases that . . . the court should pass upon the question of the extent to which the new rule is to be applied to cases tried prior to . . . [announcement of] the new rule." 398 F.2d at 625.

94. See *Maris* 97.

95. *Accommodating Institutional Responsibilities* 587-89.

96. 312 F.2d 893 (2d Cir. 1963) (en banc).

97. *Id.* at 894.

98. *Id.*

99. See *Rodriguez v. McGinnis*, 456 F.2d 79 (2d Cir. 1972) (en banc), rev'd sub nom. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). See also *United States v. Collins*, 462 F.2d 792, 801 (2d Cir.) (en banc), cert. denied, 409 U.S. 988 (1972).

100. See *Galella v. Onassis*, 487 F.2d 986, 1004-05 (2d Cir. 1973) (citing *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1021-22 (2d Cir. 1973), vacated and remanded, 94 S. Ct. 2140 (1974)).

*United States v. Collins*¹⁰¹ is an example. The court in *Collins* heard an appeal in banc "to resolve what appeared to be a difference of view"¹⁰² regarding the requirements of a statement¹⁰³ in the opinion in *Miranda v. Arizona*¹⁰⁴ concerning the interrogation of suspects. The resolution would determine whether defendant's confession of armed robbery should have been excluded at the trial. The court heard the appeal in banc because it involved a legal principle noting that it "would not have directed rehearing in banc merely to resolve a question of fact in a particular case."¹⁰⁵

*Galella v. Onassis*¹⁰⁶ is perhaps a classic example of a case that involved a question of personal injustice and apparently lacked the elements normally found in an in banc proceeding. Appeal was taken by the plaintiff to contest a panel's modification of an injunction against the photographer defendant who had harassed the plaintiff, wife of a former President, and her children.¹⁰⁷ Rejecting the argument of the dissenting judges that modification of injunctive relief was "an unwarranted appellate interference with the district court's discretion,"¹⁰⁸ the majority¹⁰⁹ asserted:

Wholly aside from our view whether it was proper for the panel to modify the district court's decree, we cannot agree with [the dissenting judges'] assessment of the importance of the question before us.

. . . [I]t hardly need be stated that the importance of a decision does not turn on whether the litigants stand in the limelight of public recognition or in the shadows of anonymity. Rather, significance rests on the precedential impact that a determination of this Court is likely to have . . . on the lives of countless others.

. . . [T]he panel's decision does not rise to the threshold of importance requisite to en banc reconsideration.¹¹⁰

"Controversial" is another term used to characterize cases that reach the importance requisite to in banc consideration.¹¹¹ Exemption of conscientious objectors, civil rights litigation, subversive activities, the death sentence,¹¹² and extraordinary actions against public officials are examples.¹¹³ In the

101. 462 F.2d 792 (2d Cir.) (en banc), cert. denied, 409 U.S. 988 (1972).

102. Id. at 801.

103. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 796 n.6 (quoting *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966)). The issue in *Collins* was whether this sentence required that interrogation stop forever or whether it permitted resumption in proper circumstances.

104. 384 U.S. 436 (1966).

105. 462 F.2d at 802.

106. 487 F.2d 986 (2d Cir. 1973).

107. Id. at 1004.

108. Id. at 1005 (Timbers, J., dissenting).

109. The majority determined that the panel had used the correct standard of appellate review. Id. at 1004.

110. Id.

111. See Maris 97.

112. Accommodating Institutional Responsibilities 588-89.

113. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (en banc); *Helfant v. Kugler*, 484 F.2d 1277 (3d Cir. 1973) (rehearing en banc granted), petition for cert. filed, 43 U.S.L.W. 3087 (U.S. Aug. 6, 1974) (No. 74-80).

Second Circuit, for example, issues touching the civil rights of individuals have received a great deal of attention in banc: search and seizure,¹¹⁴ denial of a speedy trial,¹¹⁵ voluntariness of confessions,¹¹⁶ the right of indigents to be told of their right to appeal conviction at state expense,¹¹⁷ jurisdiction of the courts,¹¹⁸ state prisoners' rights under a civil rights statute,¹¹⁹ and freedom of the press.¹²⁰ The language of Judge Kaufman in *Sostre v. McGinnis*¹²¹ is perhaps representative of both the attitude of judges toward cases involving civil rights and of other factors that prompt in banc consideration.¹²²

We voted to hear the initial argument . . . *en banc*, a procedure we reserve for extraordinary circumstances, so that we might give plenary review to a complex of urgent social and political conflicts [infra] persistently seeking solution in the courts as legal problems The elaborate opinion and order below raise important questions concerning the federal constitutional rights of state prisoners which neither Supreme Court precedent nor our own past decisions have answered. The sparse authority from other courts is for the most part either inconclusive or conflicting.¹²³

Many cases in the Second Circuit have involved the interpretation of federal statutes.¹²⁴ Often this concerns a new or broader application of the

114. *Williams v. Adams*, 441 F.2d 394 (2d Cir. 1971) (en banc), rev'd, 407 U.S. 143 (1972); *United States v. Manning*, 448 F.2d 992 (2d Cir.) (en banc), cert. denied, 404 U.S. 995 (1971). See also *United States v. Toscanino*, No. 73-2732, at 5633 (2d Cir. Oct. 8, 1974) (Mulligan, J., dissenting).

115. *United States ex rel. Frizer v. McMann*, 437 F.2d 1312 (2d Cir. 1971) (en banc).

116. *United States ex rel. Vanderhorst v. LaVallee*, 417 F.2d 411 (2d Cir. 1969) (en banc), cert. denied, 397 U.S. 925 (1970).

117. *United States ex rel. Witt v. La Vallee*, 424 F.2d 421 (2d Cir. 1970) (en banc); *United States ex rel. Smith v. McMann*, 417 F.2d 648 (2d Cir. 1969) (en banc), cert. denied, 397 U.S. 925 (1970).

118. *IBM v. United States*, 480 F.2d 293 (2d Cir. 1973) (en banc); *Scanapico v. Richmond, F. & P.R.R.*, 439 F.2d 17 (2d Cir. 1970) (en banc) (New York long arm statute; corporation "doing business"); *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir.) (en banc), cert. denied, 396 U.S. 844 (1969) (quasi in rem action based on attachment of nonresident's insurance policy).

119. *Rodriguez v. McGinnis*, 456 F.2d 79 (2d Cir. 1972) (en banc), rev'd sub nom. *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

120. *United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1970) (en banc), rev'd, 403 U.S. 713 (1971).

121. 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972).

122. In several cases the Second Circuit has found the civil rights issue of such importance that it has granted review despite the general rule that in banc proceedings should not be used to resolve factual issues involving an injustice that is personal in nature. *Williams v. Adams*, 441 F.2d 394 (2d Cir. 1971) (en banc), rev'd, 407 U.S. 143 (1972) (habeas corpus; probable cause for arrest, search, and seizure). See also *United States ex rel. Whitmore v. Malcolm*, 476 F.2d 363 (2d Cir. 1973) (en banc) (habeas corpus; appeal mooted); *United States v. Manning*, 448 F.2d 992 (2d Cir.) (en banc), cert. denied, 404 U.S. 995 (1971) (probable cause for arrest, search, and seizure).

123. 442 F.2d at 181.

124. E.g., *Hartman Tobacco Co. v. United States*, 471 F.2d 1327 (2d Cir. 1973) (en banc) (Internal Revenue Code); *NLRB v. Marsellus Vault & Sales, Inc.*, 431 F.2d 933 (2d Cir. 1970) (en banc) (National Labor Relations Act). See also *United States v. New York Times Co.*, 444

statute.¹²⁵ This has been particularly true in cases where liability is predicated on section 10(b) of the Securities Exchange Act of 1934¹²⁶ and rule 10b-5 promulgated under that Act.¹²⁷ The court's statement in the most recent of these cases¹²⁸ could have been made with respect to each of the six section 10(b)¹²⁹ and rule 10b-5 cases that have been heard in banc since 1968 when rule 35 became effective: "We sit *en banc* to decide a question important to the course of evolution of the law"¹³⁰ That evolution, in turn, has far-reaching significance on future litigation.

The fact that a case affects many parties or potential litigations or involves large sums of money does not guarantee nor even make probable in banc consideration. The cases defy generalization. Who, for instance, could have predicted that the Second Circuit would grant in banc consideration in *United States v. Certain Property*,¹³¹ for the purpose of deciding the measure of damages for short term leaseholders who owned trade fixtures in condemned structures,¹³² but would deny in banc consideration in two cases, *Eisen v. Carlisle & Jacquelin*¹³³ and *Zahn v. International Paper Co.*,¹³⁴ involving the requirements for a class action under rule 23 of the Federal Rules of Civil Procedure. And who could have predicted denial in a case involving equal protection standards, *Boraas v. Village of Belle Terre*.¹³⁵ The denials¹³⁶ certainly focused on issues that potentially would affect more future cases than the condemnation case and therefore, would seem to merit additional attention. An examination and comparison of the cases is instructive. *Boraas*

F.2d 544 (2d Cir.) (en banc), rev'd, 403 U.S. 713 (1971) (18 U.S.C. §§ 792-99 (1970) (unlawful disclosure of classified information)).

125. The use of in banc procedure is in accord with the nature of the cases that Judge Maris suggested should be given in banc consideration, i.e., those "where an important new principle of law or the construction of a new statute or the determination of a new point of procedure of widespread interest is involved and the court is divided in opinion or regards the matter to be of such importance as to call for the more authoritative opinion of seven judges" Maris 97.

126. 15 U.S.C. § 78j(b) (1970).

127. 17 C.F.R. § 240.10b-5 (1974).

128. *Lanza v. Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973) (en banc).

129. *Drachman v. Harvey*, 453 F.2d 722 (2d Cir. 1972) (en banc); *Chris-Craft Indus., Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970) (en banc) (involving § 14(e) of the 1934 Act, an antifraud provision similar to § 10(b)); *SEC v. Great Am. Indus., Inc.*, 407 F.2d 453 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 920 (1969); *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969); see note 128 *supra*.

130. 479 F.2d at 1279.

131. 388 F.2d 596 (2d Cir. 1968) (en banc).

132. The court apparently granted in banc review because it found merit in the tenants' contentions: (1) the panel's decision "would have a serious effect on similar fixture claims of tenants in other condemnations pending in the circuit" and (2) the panel's discussion "ran counter to relevant portions of recent decisions of two other panels." *Id.* at 600.

133. 479 F.2d 1005, 1020 (2d Cir. 1973), vacated and remanded, 94 S. Ct. 2140 (1974).

134. 469 F.2d 1033, 1040 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973).

135. 476 F.2d 806, 824 (2d Cir. 1973), rev'd, 416 U.S. 1 (1974).

136. See also *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463, 494 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972).

was a civil rights action challenging the constitutionality of a village zoning ordinance which limited occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons. The panel, reversing the district court,¹³⁷ determined that the ordinance violated the equal protection clause. The Second Circuit, splitting four to four, denied in banc review. Dissenting from the denial, Judge Timbers argued that the version of the new equal protection standard applied by the majority of the panel was a "substantial question of unusual importance,"¹³⁸ because, *inter alia*, the panel had applied an equal protection test different than that held applicable in a recent Supreme Court decision, *San Antonio Independent School District v. Rodriguez*.¹³⁹ In addition, Judge Timbers asserted, the panel's decision when read in conjunction with recent decisions of two other panels "makes it virtually impossible for a district court in this Circuit, or a panel of our Court, to determine what equal protection standard to apply in a case before it."¹⁴⁰ Replying to the dissent, Judge Mansfield denied that the case was "one of those truly extraordinary cases that warrants review *en banc*"¹⁴¹ because "[i]f anything, our decision here is in accord with the Supreme Court's decision in *Rodriguez*."¹⁴² In addition, Judge Mansfield argued that an in banc hearing would not clarify the area of equal protection because

in pursuing the elusive quest for standards we are dealing with broad general principles which must be capable of adaption to widely varying factual contexts. Nothing . . . could be sufficiently precise to have a binding effect throughout the Circuit in other cases, which would inevitably involve significantly different factors, especially since our views would be expressed by a divided court, with district judges looking primarily to the Supreme Court for ultimate guidance.¹⁴³

The reasons for denial of in banc review in *Eisen* appear, on first impression, to bear sharp contrast to the reasons for denial in *Boraas*. Where *Boraas* was not of sufficient importance to warrant an in banc proceeding, *Eisen* was of "such extraordinary consequence" that surely the Supreme Court would grant certiorari.¹⁴⁴ *Eisen* was an antitrust class action brought on behalf of all odd lot investors in securities to recover excessive commissions. On appeal, the case centered on the question whether the named plaintiff must give actual notice to those class members whose identities could be ascertained with reasonable certainty. As in *Boraas*, inconsistency within the circuit and district courts was asserted.¹⁴⁵ Concurring in the denial, Judge Mansfield reasoned that because the case was of exceptional importance it should be resolved by "the most authoritative resolution possible. If the recent

137. 367 F. Supp. 136 (E.D.N.Y. 1972), rev'd, 469 F.2d 1033 (2d Cir.), aff'd, 414 U.S. 291 (1973).

138. 476 F.2d at 825 (Timbers, J., dissenting).

139. 411 U.S. 1 (1973).

140. 476 F.2d at 825 (Timbers, J., dissenting).

141. *Id.* at 829.

142. *Id.* at 828.

143. *Id.*

144. 479 F.2d at 1020.

145. *Id.* at 1025 (Oakes, J., dissenting).

history of *en banc* proceedings in this Court is any indication, however, an *en banc* hearing would result in opinions expressing diverse views, necessitating ultimate resolution by the Supreme Court."¹⁴⁶

The reasons advanced by Judge Mansfield in *Boraas* and *Eisen* offer several conclusions: if the Supreme Court has already ruled on the issue and the instant case is in accord, the case is not important enough for in banc consideration; if the Supreme Court has not ruled on the issue, the case may be *too* important to warrant delay in in banc proceedings. In either case, if there is too much diversity of opinion within the circuit, the majority of circuit judges may decide that an in banc proceeding would be futile.

Thus, by an ironic twist, both criteria for granting in banc consideration under rule 35 have been used to deny in banc consideration, *i.e.*, if the case is too important or if there is too much diversity of opinion.

What might be called the "majority test" of importance found expression in *Zahn v. International Paper Co.*¹⁴⁷ There, a minority of three active judges blocked in banc reconsideration¹⁴⁸ despite the fact that four active judges had voted to grant it.¹⁴⁹ In defending the majority requirement of rule 35, the provision which fostered the anomalous result,¹⁵⁰ Judge Mansfield stated: "The majority requirement serves the further salutary purpose of limiting *en banc* hearings to questions of exceptional importance rather than allow the court to drift into the unfortunate habit of requiring such hearings in every case where a minority of the court may desire a decision by the full court."¹⁵¹ In an emphatic dissent, Judge Timbers focused on the substantive issue of the case, the question of whether the unnamed parties in a class action must satisfy the \$10,000 jurisdictional requirement of 28 U.S.C. § 1332(a) in a diversity suit.¹⁵² The importance of this issue negated, in Judge Timbers' mind, the justifications offered by Judge Mansfield for denial. In a later case¹⁵³ in which Judge Timbers again analyzed the mechanics of *Zahn*, he noted that the Supreme Court had granted certiorari in *Zahn*, "thus laying at rest any notion that the issue which four of the active judges of this Court had voted to reconsider *en banc* was not a substantial question of unusual importance."¹⁵⁴

C. Additional Factors Influencing Decisions to Grant In Banc Consideration

While not sufficient of themselves, in conjunction with an important or divisive issue there are three additional factors that might add to the desirability of an in banc hearing or rehearing. These factors are: stymied panels, intercircuit conflict, and the service of non-active judges on the

146. *Id.* at 1021 (Mansfield, J., concurring).

147. 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973).

148. They stated that it appeared that the panel would be affirmed in any case. *Id.* at 1040.

149. For an explanation of this result, see text accompanying note 177 *infra*.

150. For a discussion and criticism of the majority rule, see section V(D), *infra*.

151. 469 F.2d at 1041.

152. *Id.* at 1042 (Timbers, J., dissenting).

153. *IBM v. United States*, 480 F.2d 293 (2d Cir. 1973) (*en banc*).

154. *Id.* at 304.

panel.¹⁵⁵ The first is a very rare occurrence.¹⁵⁶ The second, while not rare, is seldom resolved by an in banc proceeding. A court of appeals in banc may, of course, attempt to harmonize its decision or decisions with those of other courts of appeals,¹⁵⁷ but, ultimately, intercircuit conflict must be resolved in the Supreme Court. The third factor, the service of non-active judges on a panel, is apparently a substantial consideration in deciding whether or not to grant rehearing in banc.¹⁵⁸ This is in accord with the stated purpose of rule 35—to maintain majority control over important issues and to secure or maintain uniformity of decision. It can be argued that non-active judges are not likely to be as familiar with the law of the circuit; that they have less prestige than the active judges of a court of appeals; and that there is consequently a likelihood of review or reversal of their decisions by the court in banc.

V. PROBLEMS WITH THE IN BANC PROCEDURE

A number of problems relating to in banc procedure have developed. The major ones will be discussed below, with suggestions for alleviation where that appears possible.

A. *Lost Efficiency*

The major problem with an in banc proceeding is the resulting loss of efficiency.¹⁵⁹ A court comprised of three judges can decide a case in less time than a court comprised of seven to fifteen judges.¹⁶⁰ This is a natural corollary to the fact that an in banc proceeding gives greater advance exploration¹⁶¹ to the issues since the court is opened to more discussion and thus to potentially more divergent views.¹⁶²

155. Accommodating Institutional Responsibilities 592-98.

156. *Id.* at 593. A stymied panel is one in which no two judges can agree on what to do.

157. In the Second Circuit, intercircuit conflict apparently has been a factor in granting in banc review in at least two cases. *United States v. Kaylor*, 491 F.2d 1133, 1135 (2d Cir.) (en banc) vacated and remanded sub nom. *United States v. Hopkins*, 94 S. Ct. 3201 (1974); *Hartman Tobacco Co. v. United States*, 471 F.2d 1327, 1330 (2d Cir. 1973) (en banc) ("[W]e think it best to clear up any confusion on the issue [capital gains treatment on transfer of a right to remove sand and gravel from land] that there may be in this circuit and to align the Second Circuit with every other circuit which has confronted the question."). See also Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 612 et seq. (1969).

158. Accommodating Institutional Responsibilities 595-98.

159. See *id.* at 576-77. A study of the period 1956 through 1964 found the average disposition time for a panel in the Second Circuit was two and one-half months after oral argument. The disposition time for a case heard in banc was four and one-half months. When the case was heard in banc after a panel had been assigned to it the time between argument and decision was eight to eleven months. *Id.* at 577. In 1973, the median time from hearing or submission to final disposition was 7 months. 1973 Ann. Rep. 310 (Table B-4). The same period was 155 days when a case was reheard in banc. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1026 (2d Cir. 1973) (Oakes, J., dissenting), vacated & remanded, 94 S. Ct. 2140 (1974).

160. All the courts of appeals have at least seven judges except the First Circuit.

161. K. Llewellyn, *The Common Law Tradition: Deciding Appeals* 314 (1960).

162. The high incidence of disagreement in the in banc courts is one indication of this. See Accommodating Institutional Responsibilities 608 (App. IV).

When the increase in the time required for decision is considered in conjunction with the lost service¹⁶³ of judges who could be occupied elsewhere the procedure becomes even more onerous. This is particularly true in those circuits that are already hard-pressed to keep the current backlog to a minimum.

The in banc procedure is inherently and unavoidably time-consuming. So long as it is used it will, ipso facto, slow the courts' business—yet it is necessary. There is no answer to this dilemma. It is suggested, however, that the creation of additional circuits and new judgeships could help alleviate the more general problem of backlog in the courts of appeals.¹⁶⁴ The creation of new judgeships alone might be unwise since it has become apparent in the Fifth (15 judges) and Ninth (13 judges) Circuits that there is an inherent institutional limit to the size of a court. *Inter alia*, it is extremely difficult for a court so large to sit in banc.¹⁶⁵

B. *The Power of a Court In Banc*

Since each panel is considered to be the court of appeals,¹⁶⁶ it may be asked whether the court in banc constitutes a superior court situated between the Supreme Court and the courts of appeals. It might be contended that, as such, the court in banc is not authorized. This raises two questions about the power of the court in banc.

First, can the court limit the issues it will consider when rehearing a case in banc? A rehearing on limited issues might seem to constitute a kind of appellate review of the panel decision. This would be inconsistent with the in banc court's rehearing function which is not to *review* panel decisions but to *rehear* appeals. Nevertheless, it is clear from the cases that the court in banc can limit the issues it will consider on rehearing.¹⁶⁷ This result seems, if not logically indisputable, at least necessary, as a practical matter. Of course it may be argued that a rehearing in banc is just another kind of rehearing and that rehearings may be limited in scope;¹⁶⁸ but, more simply and more

163. For instance, there are currently eight active judges in the Court of Appeals for the Second Circuit. (Although nine judgeships are authorized, one is vacant at the present time.) At a minimum, these judges could comprise two full panels to hear cases while two judges write opinions or tend to administrative matters. With the services of non-active judges assigned to the court the number of panels could be as high as eight. There is apparently no limitation upon the number of non-active judges who may sit on a panel.

164. The Commission on Revision of the Federal Court Appellate System has recommended the creation of two new circuits, through realignment of the present Fifth and Ninth Circuits, as a necessary first step in coping with the administrative problems of the courts of appeals. Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change 3* (1973).

165. *Id.* at 1-2.

166. See note 3 *supra* and accompanying text.

167. E.g., *United States v. Collins*, 462 F.2d 792 (2d Cir.) (en banc), cert. denied, 409 U.S. 988 (1972); *Farrand Optical Co. v. United States*, 317 F.2d 875 (2d Cir. 1963) (en banc), noted in 77 Harv. L. Rev. 767 (1964).

168. *Louisell & Degnan, Rehearing in American Appellate Courts*, 44 Calif. L. Rev. 627, 651

importantly, it must be noted that limiting issues saves time. This alone would seem sufficient justification for the practice, at least where other arguments pro and con are inconclusive.

The second, and more difficult, problem is related to the first and involves the power of the court in banc to decide a case—a power which requires the court in banc to exercise authority over the panel. An example would be an order of remand to the panel for further consideration in light of the decision of the court in banc.¹⁶⁹ The question is whether the court in banc has such power. There is neither denial nor affirmance of authority for such an order in the rules or related statutes. Although the order seems to create a superior court, the procedure saves time and is in accord with the mandate of the conference to create rules which bring about just and speedy determination of cases.¹⁷⁰ The procedure is at least tolerated by the Supreme Court, which has not yet seen fit to deny its application in the instances where the procedure has been before the Court, either directly or indirectly.¹⁷¹

C. Oral Argument

The litigant has no absolute right to an oral argument before the court in banc, at least on rehearing; rather, it appears that the litigant has a qualified right¹⁷² to an oral argument subject to suspension by rule 2¹⁷³ or by agreement of the parties.¹⁷⁴ However, the circuits have adopted the practice of making in banc sittings upon the briefs alone, without oral argument.

This procedure, while more expeditious, seems incongruous considering the nature of the proceeding. If a case is important enough to warrant the time required for in banc consideration, it would seem also to warrant the minimal additional time needed for oral argument.

An issue which is to be heard in banc is generally one which transcends the facts of the particular case.¹⁷⁵ As a result, the judges may choose to plumb orally an issue which was not fully explored in the brief. This is particularly

(1956); see Fed. R. App. P. 40 ("The petition [for rehearing] shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended . . .").

169. See *Farrand Optical Co. v. United States*, 317 F.2d 875, 886 (2d Cir. 1963) (en banc) (Waterman, J., dissenting).

170. 28 U.S.C. § 331 (1970).

171. See *American-Foreign S.S. Corp. v. United States*, 265 F.2d 136 (2d Cir. 1958) (en banc), vacated and remanded, 363 U.S. 685 (1960); *Herzog v. United States*, 235 F.2d 664 (9th Cir.) (en banc), cert. denied, 352 U.S. 844 (1956).

172. "Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument." Fed. R. App. P. 34(b).

173. "In the interest of expediting decision, or for other good cause shown, a court of appeals may . . . suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction." Fed. R. App. P. 2.

174. "By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued." Fed. R. App. P. 34(f).

175. See section IV(B) *supra*.

true because the Federal Rules of Appellate Procedure impose¹⁷⁶ limitations of form and style upon briefs which are to be submitted to a court of appeals.

D. *Disqualified Judges and the Majority Rule*

When an active judge is disqualified from voting on a suggestion for in banc consideration, he is nevertheless counted as a member of the court in active service. Since a majority of the court in service must vote in favor of in banc consideration, disqualification operates as a negative vote.¹⁷⁷ This effect seems contrary to the rule that a judge who is disqualified may not act in determining any cause from which he is barred.¹⁷⁸ One alternative would be to allow the disqualified judge to vote on the suggestion. The better alternative, however, would be to allow the requisite majority to be decreased in this instance so that a majority of judges voting would suffice to carry the vote. Although it has been argued¹⁷⁹ that allowing a majority of voting judges to carry the motion may have the effect of allowing a minority of the court to control the majority, it is more important, as Judge Timbers noted in *IBM v. United States*,¹⁸⁰ that issues of importance receive in banc consideration than it is that the vote of a single judge could block in banc attention.¹⁸¹

There has been dissatisfaction expressed with the need for a majority where an in banc sitting could not be had because of an evenly split vote. Where the court is comprised of an even number of judges, it would seem that the split vote ought to be sufficient to prompt the court to sit together to attempt to resolve an issue about which there is clearly serious disagreement.¹⁸²

176. Fed. R. App. P. 28, 32.

177. For instance, in *Zahn v. International Paper Co.*, 469 F.2d 1033, 1040 (2d Cir. 1972), aff'd, 414 U.S. 291 (1973), a minority of three active judges voting to deny in banc reconsideration prevailed over four active judges who voted to grant in banc review. This resulted because there was a vacancy on the nine-judge court and one of the eight active judges did not vote because of disqualification. In a vigorous dissent, Judge Timbers criticized the result as "most unfortunate in thwarting the clear intent of the rule." *Id.* at 1042. It was particularly undesirable in *Zahn*, he continued, because the case involved "one of the more pressing issues of our day—an issue to which the best thinking of legal scholars, lawyers and judges has been devoted." *Id.* For a discussion of *Zahn* see notes 147-54 *supra* and accompanying text.

178. See 28 U.S.C. § 144 (1970).

179. *Zahn v. International Paper Co.*, 469 F.2d 1033, 1041 (2d Cir. 1972), aff'd, 414 U.S. 291 (1973) (Mansfield, J., concurring).

180. 480 F.2d 293, 305 (2d Cir. 1973) (en banc) (Timbers, J., dissenting).

181. In *IBM* the court granted in banc review but dismissed the appeal on the grounds that the court lacked jurisdiction. In his dissent from the dismissal, Judge Timbers analyzed the "facts of en banc life," *id.* at 303-05, and concluded: "The moral of the en banc procedure in this case . . . is that it is of less importance that the vote of a single active judge could have blocked en banc reconsideration than that each active judge was willing to vote in favor of en banc, thus assuring that the will of the other four to reconsider the case en banc was not thwarted." *Id.* at 305 (emphasis deleted).

182. See, e.g., *Boraas v. Village of Belle Terre*, 476 F.2d 806, 825 (2d Cir. 1973) (Timbers, J., dissenting), rev'd, 416 U.S. 1 (1974); *Zahn v. International Paper Co.*, 469 F.2d 1033, 1041-42 (2d Cir. 1972) (Timbers, J., dissenting), aff'd, 414 U.S. 291 (1973).

E. Extreme Diversity and Extraordinary Cases

As noted above,¹⁸³ the Second Circuit has denied in banc review on the grounds that the case was of such extraordinary importance or created so much diversity of opinion that only the Supreme Court could resolve the issues. In other instances it has denied review because the majority of voting judges believe the decision of the panel would be affirmed.¹⁸⁴ Each of these purported justifications for denying in banc consideration may act as a disservice to the purposes of rule 35.

Judge Oakes, in his dissent to the denial of in banc review in *Eisen III*,¹⁸⁵ aptly criticized the majority's rationale that the case was of such exceptional importance that only the most authoritative court should decide the issue: "For this court not to hear a matter of this significance is to render the en banc statute a nullity."¹⁸⁶ His reasons are persuasive: the Supreme Court has admonished the courts of appeals to hear cases in banc;¹⁸⁷ without in banc procedures, the burden on the Supreme Court would be greater than it already is;¹⁸⁸ it is presumptuous to think that the Supreme Court will grant certiorari;¹⁸⁹ if the Supreme Court should grant review, it would be valuable for the Court to have before it a different view than the panel's;¹⁹⁰ in banc procedure or some substitute for it is necessary to "ensure cohesion, a degree of uniformity and the promotion of appellate justice, in the Court of Appeals,"¹⁹¹ none of which is accomplished when the court relies on the contingency of Supreme Court review.¹⁹² In short, he concluded, "[w]e will at least be somewhat unpredictable, and this may create enough litigation on the chance that an individual panel may reverse that our calendar will become as unmanageable as the panel opinion felt the instant class action was."¹⁹³

Denial of in banc review because of the belief that the panel decision will be affirmed evades the question of whether the case presents issues of substantial importance. If an issue is important, opportunity should be afforded for airing divergent views. This is particularly true where one or more of the judges who formed the panel majority favor in banc proceedings.¹⁹⁴ In addition, a decision in banc on the merits, even if it merely

183. See text accompanying notes 146-48 *supra*.

184. E.g., *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973); *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

185. 479 F.2d 1005, 1021 (2d Cir. 1973), *vacated and remanded*, 94 S. Ct. 2140 (1974).

186. *Id.* at 1021 (Oakes, J., dissenting) (footnote omitted).

187. *Id.* at 1022, 1025.

188. *Id.* at 1025.

189. *Id.* at 1026.

190. *Id.*

191. *Id.* at 1025.

192. *Id.* at 1026.

193. *Id.*

194. E.g., *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463, 494 (2d Cir. 1971) (Timbers, J., dissenting), *cert. denied*, 407 U.S. 926 (1972).

affirms the panel, has more precedential value than the panel decision and thereby aids uniformity of justice. In short, it eliminates any chance of a fortuitous composition of the panel and improves the palatability of the decision.¹⁹⁵

F. *Failure to Achieve Uniformity*

Even when a court follows the Supreme Court mandate¹⁹⁶ to use in banc review, the goal of uniformity may be thwarted. A lack of agreement in the in banc proceeding may leave the issue as unresolved, or create greater uncertainty.¹⁹⁷ Such a failure to establish a *clear* majority view leaves a judge who disagrees an opportunity to interpret or distinguish subsequent cases in a manner actually inconsistent with the majority view.¹⁹⁸

In order to give the desired effect to the in banc proceeding employed to resolve intracircuit conflict, two factors must be present. First, the court must develop opinions clearly expressing the opinion of the majority to be followed. Second, the panels must follow the in banc precedents with even greater zeal than prior panel decisions.¹⁹⁹

VI. CONCLUSION

Although rule 35 has clarified the in banc procedure and provided some uniformity throughout the circuits, serious problems remain both for litigants and for the courts. While litigants remain frustrated by the impossibility of predicting what cases will be deemed worthy of in banc consideration, the courts find themselves torn between the institutional necessity for the procedure and its practical burdens. Despite increasing concern and discussion, it seems inevitable that this balance, between necessity and burden, will continue to be struck on a circuit by circuit, case by case, basis.

It might be suggested that in order to facilitate a more predictable outcome in granting or denying in banc consideration the judges look more to the substance of the rule. When a case is exceptionally important or suggests a conflict it should be heard in banc. Such ancillary issues as the time taken for the determination,²⁰⁰ the final outcome on the merits,²⁰¹ and the eventual grant of certiorari by the Supreme Court should be ignored in considering the case for in banc.²⁰²

The requirement that the majority of active judges vote to in banc a case

195. See generally *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1020-26 (2d Cir. 1973), vacated and remanded, 94 S. Ct. 2140 (1974).

196. See note 187 *supra* and accompanying text.

197. See *Accommodating Institutional Responsibilities* 583-85.

198. *Id.*

199. *Id.*

200. See, e.g., *Eisen v. Carlisle & Jacquelin*, 479 F.2d at 1020 (Kaufman, J., on petition for in banc); *id.* at 1021 (Mansfield, J., concurring). But see *id.* at 1021 (Oakes, J., dissenting).

201. See *Boraas v. Village of Belle Terre*, 476 F.2d at 827 (Mansfield, J., replying to the dissent). But see *id.* at 825 (Timbers, J., dissenting).

202. See *Eisen v. Carlisle & Jacquelin*, 479 F.2d at 1021 (Oakes, J., dissenting); section V(E) *supra*.

should be changed to the majority of those judges voting.²⁰³ It would seem to be advisable that this rule be even further liberalized to allow a tie vote to suffice for in banc consideration. It should be remembered that the vote on in banc is not a vote on the merits but a vote on whether the issues are sufficiently important or whether there is a conflict. It would seem that in a case like *Boraas* where four of eight judges thought there was a conflict and an issue of importance, in banc should be utilized to hear or rehear the issue before the entire court. Furthermore, the circulation of panel opinions to the other active judges of the court before publication might improve the efficiency of the in banc procedure by allowing the case to be heard in banc rather than reheard in banc.²⁰⁴ It also seems to be an anomaly of the procedure that although a case is taken in banc it is often on submission of the papers without oral argument. It would appear that, if a case is of such exceptional importance that it merits the consideration of the entire court, it certainly merits the relatively short time it takes for oral argument.²⁰⁵

"While certainty in the law is a virtue, history discloses that resilience is equally essential."²⁰⁶ Similarly, in the courts of appeals, the desire for certainty, and finality of decisions, should not prevent judges from being "more gingerly about declining to act as a full court in ruling upon substantial questions of unusual importance."²⁰⁷ Nor should the virtues of flexibility prevent reforms along the lines suggested above.

Peter Michael Madden

203. Report of the Judicial Conference, reprinted in 1973 Ann. Rep. 47. The Judicial Conference has recommended proposed legislation to effect this change. *Id.*; see section V(D) *supra*.

204. See *Eisen v. Carlisle & Jacquelin*, 479 F.2d at 1021 (Oakes, J., dissenting); *Maris* 96; section V(A) *supra*.

205. See section V(C) *supra*.

206. *Boraas v. Village of Belle Terre*, 476 F.2d 806, 828 (2d Cir. 1973) (Mansfield, J., concurring), *rev'd*, 416 U.S. 1 (1974).

207. *Galella v. Onassis*, 487 F.2d 986, 1005 (2d Cir. 1973) (Timbers, J., dissenting).